doctors was called to examine the deceased before executing the will.

(xii) Nor the propounder of the will called any member of the hospital staff to give evidence on the mental capacity of the deceased or the valid execution of the will. Nor was any hospital staff asked to be a witness to the will.

(xiii) The deceased did not put his thumbprint voluntarily. It was physically placed on the will by the son with the help of the solicitor.

(xiv) The will was deliberately concealed by Golbalakal and the defendant after the death of the deceased.

(xv) Golbalakal eventually told the truth about the will to appellant. He admitted that deceased did not know anything about the will and said 'That will 'we' had done it.' 'We' meaning he and his mother. He also said "We wanted the property to be in one hand" to avoid trouble between brothers. 'We' again referring to himself and his mother. There is no conflict on this evidence because it had not been contradicted.

(xvi) Again, Golbalakal had admitted to Haji Omar (P.W.4) that his father did not know about the will as his father was very seriously ill. He also said his father did not know about the thumbprint. There is no conflict on this evidence as well because it was not controverted."

I find that the judge had assessed them but only in the context of the plea of undue influence, and had come to the conclusion that there was no undue influence. The onus should have been on the respondent to explain them before the matter of undue influence could be dealt with.

It seems to me that these errors stem from a wrong approach to the question of onus.

The last point for consideration is the question of a retrial.

The relevant case is *Pickup* v. *The Thames and Mersey Marine Insurance Company, Limited.*[4] This was an action on a policy of insurance on a cargo of rice on board ship, *Diadem*, on a voyage from Rangoon to the United Kingdom. Eleven days after she had started on the voyage, she encountered severe squalls, heavy sea and made so much water that it had to be put back to Rangoon.

The judge directed the jury that the time which elapsed between setting sail and putting back was sufficiently short to shift the onus from the underwriters (the defendants) and make it encumbent on the assured (plaintiff) to prove that the unseaworthiness arose from causes occurring subsequently to setting sail.

It was held that this was a misdirection as "it placed a much heavier burden upon the plaintiff... and consequently the plaintiff instead of undertaking a burden of proving a loss by peril insured against upon a ship which at all events is not presumed to be unseaworthy... was undertaking a burden of proving that loss in respect of a ship which according to the judge's direction was presumably unseaworthy when it started." A new trial was ordered.

In the instant case the misdirection resulted in a substantial wrong in that the appellant had, as I pointed out earlier, to undertake on an issue as to testamentary capacity the burden which was not on him of proving, in the first instance, testamentary incapacity.

There will be an order for a new trial.

The costs of this appeal and the costs of the first trial should follow the event of the new trial.

Azmi L.P. and **Pawan Ahmad J.** concurred.

New trial ordered.

MAHON v. MAHON

[F.C. (Ong C.J. (Malaya), Ali F.J. and Chang Min Tat J.) September 9, 1971]

[Ipoh — Federal Court Civil Appeal No. 32 of 1971]

Family Law — Divorce — Whether wife "ordinarily resident" in Malaysia — Divorce Ordinance, 1952, s. 49(1)(b).

This was an appeal from the decision of the High Court in Penang ([1971] 1 M.L.J. 287) which had dismissed a petition for divorce on the ground that the petitioner was away in Ireland during fifteen months of the three years immediately preceding the filing of the petition. The parties were domiciled in Ireland but they have had their matrimonial home in the Federation for the past fifteen years.

Held, allowing the appeal: in the circumstances there can be no doubt that the petitioner had been "ordinarily resident" in the Federation since 1955.

Cases referred to:-

(1) *Hopkins* v. *Hopkins* [1950] 2 All E.R. 1035.

(2) *Levene* v. *Commissioners of Inland Revenue* [1928] A.C. 217, 222.

(3) *Fox* v. *Stirk* [1970] 3 All E.R. 7.

FEDERAL COURT.

Lim Kean Siew for the appellant.

S. Thillaimuthu for the respondent.

Cur. Adv. Vult.

Ong C.J. (Malaya): The wife's petition for divorce was dismissed by the High Court in Penang on the ground that she was away in Ireland during 15 months of the 3 years immediately preceding the filing of the petition. She now appeals against such decision.

The parties' domicil is Ireland. The court's jurisdiction to entertain proceedings by the wife, therefore, rests on section 49(1)(b) of the Divorce Ordinance 1952, that is to say, "if the wife is resident in the Federation and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings".

From facts disclosed in the petition and on inspection of the petitioner's passport, the judge found that the petitioner was not "ordinarily resident" in the Federation during two periods of her absence in Ireland, totalling about 15 months, within the three years preceding the commencement of the proceedings. He accordingly held, following *Hopkins* v. *Hopkins*,[1] that the court should not arrogate to itself jurisdiction to decide on a matter affecting status and dismissed the petition.

With respect I think the learned judge appears to have overlooked the fact that immediately after their marriage in Ireland on July 4, 1955 the parties left for Malaya and have for the past 15 years had their matrimonial home in the Federation. In the

circumstances there can be no doubt that the petitioner has been "ordinarily resident" in the Federation since 1955. As Viscount Cave, L.C. said in *Levene* v. *Commissioners of Inland Revenue*: (2)

"The word 'reside' is a familiar English word and is defined in the Oxford English Dictionary as meaning 'to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place.' No doubt this definition must for present purposes be taken subject to any modification which may result from the terms of the Income Tax Act and Schedules; but, subject to that observation, it may be accepted as an accurate indication of the meaning of the word 'reside'. In most cases there is no difficulty in determining where a man has his settled or usual abode, and if that is ascertained he is not the less resident there because from time to time he leaves it for the purpose of business or pleasure. Thus, a master mariner who had his home at Glasgow where his wife and family lived, and to which he returned during the intervals between his sea voyages, was held to reside there, although he actually spent the greater part of the year at sea."

In *Fox* v. *Stirk*,(3) where the qualification to vote at a parliamentary election in any constituency depended on the voter being "resident" there on the qualifying date, Lord Denning M.R. quoted Viscount Cave L.C. with approval and went on as follows: —

"Hence I derive three principles. The first principle is that a man can have two residences. He can have a flat in London and a house in the country. He is resident in both. The second principle is that temporary presence at an address does not make a man a resident there. A guest who comes for the weekend is not resident. A short-stay visitor is not resident. The third principle is that temporary absence does not deprive a person of his residence. If he happens to be away for a holiday or away for the weekend or in hospital, he does not lose his residence on that account.

....

I think that a person may properly be said to be 'resident' in a place when his stay there has a considerable degree of permanence."

What is the object and purpose of section 49(1)(b) but to spare a wife needless hardship? The prescribed period of three years could only have been intended to prevent transient visitors, who are not *bona fide* resident, with some degree of permanence. in the Federation from availing themselves of the court's assistance. The crucial fact required to be established by the wife is residence for *at least* three years. The petitioner in this case has in fact been ordinarily resident in the Federation for over 15 years. The greater must include the lesser. Any other interpretation would mean hardship compelling the petitioner to seek her divorce in Ireland. The petition is not even contested.

I would accordingly allow this appeal; costs of this appeal to abide by the decision on the petition.

Ali F.J. and **Chang Min Tat J.** concurred.

Appeal allowed.

Solicitors: *Lim Kean Siew & Co.; Thillaimuthu & Co.*

KHAMIS v. PUBLIC PROSECUTOR

[A. Cr. J. (Sharma J.) September 14, 1971]

[Malacca — Criminal Appeal No. 8 of 1971]

Criminal Law and Procedure — Evidence — Appeal — Plea of insanity or mental deficiency not suggested at the trial — Fresh evidence — Principles on which the appellate court should exercise its discretion in allowing fresh evidence to be called — Criminal Procedure Code (Cap. 21), s. 311.

This was an application under section 311 of the Straits Settlements Criminal Procedure Code (Cap. 21) for additional evidence to be adduced at the hearing of this appeal. The appellant was charged in the magistrate's court under section 353 of the Penal Code for having assaulted a field assistant in the discharge of his duties as a public servant. The appellant was not represented in the lower court but he claimed trial, cross-examined the prosecution witness and put up his own defence. The accused sought to set up the plea of insanity.

Held: the taking of additional evidence becomes necessary only if a failure of justice would result if such additional evidence was not taken. It is allowed when additional facts have come to light since the date of the trial. However, in this case, there was no evidence to support the plea of insanity.

[Editorial Note: As to when the court will or will not allow the fresh evidence to be called, see cases digested in *Mallal's* Digest vol. II §§ 4859-4878]

Cases referred to:-

(1) *R.* v. *Parks* [1961] 3 All E.R. 633 at p.634.
(2) *R.* v. *Lomas* [1969] 1 All E.R. 920 at p.923.
(3) *R.* v. *Atkins* 1 Cr. App. R. 45.
(4) *R.* v. *Dashwood* 28 Cr. App. R. 167 at p.169.
(5) *R.* v. *Pitchforth* 1 Cr. App. R. 249.
(6) *R.* v. *Herbert Collins* 34 Cr. App. R. 146 at p.148.

MAGISTRATE'S CRIMINAL APPEAL.

A. K. Bashir for the appellant.

Ahmad bin Haji Abdul (Deputy Public Prosecutor) for the respondent.

Sharma J., (delivering oral judgment): This is an application under section 311 of the Straits Settlements Criminal Procedure Code for additional evidence to be adduced at the hearing of the appeal. The appellant was charged in the magistrate's court, Alor Gajah, under section 353 of the Penal Code for having assaulted a field assistant in the discharge of his duties as a public servant. The appellant was not represented in the lower court but he claimed trial, cross-examined the prosecution witnesses and put up his own defence in as best a way as he could. The complainant was the officer in charge of the F.L.D.A. Scheme at Bukit Payong and one of his duties was to supervise the tapping of rubber by those who had settled in the area. The accused was one of such settlers. The prosecution evidence was that when the complainant (P.W.1) visited the area, he found the accused injuring the rubber trees. He advised the accused to tap the trees properly whereupon the accused told him that he could do what he liked. P.W.1 had to run away from the scene because the accused threatened him with the tapping knife and ran after him uttering the words that he (the accused) would kill P.W.1. The accused while cross-examining P.W.1 did suggest to him that he (the accused) was on a hill and that P.W.1 had asked him to come down. The defence put up by the accused was exactly in line with